

APPENDIX.

THE OPINION OF JUDGE LEARNED HAND IN THE CASE OF UNITED STATES v. GIVANITTI.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK.

UNITED STATES OF AMERICA AGAINST ARTURO GIVANITTI,
ET AL.

The defendants were indicted in Chicago under the Espionage Act and held for bail upon their arrest in the Southern District of New York upon warrants of removal. They furnished cash bail under the statute, which was deposited in the Registry of this Court. The case came on for trial and upon motion of the United States the indictments were dismissed against the two defendants here in question. Thereupon, upon motion to recover the bail, the clerk retained one per cent for "receiving, keeping and paying out money" in pursuance of the orders of this court (Revised Statutes section 828). This motion is for an order directing the clerk to pay the percentage so retained.

CHARLES RECHT for the motion.

RALPH W. HORNE Assistant U. S. Attorney for the clerk.

LEARNED HAND, D. J.: By section 974 of the Revised Statutes the court may in all cases of conviction charge costs against the defendant. By section 975, if an informer or plaintiff on a penal statute fails to get judgment he must pay costs to the defendant

unless he is an official, and by section 976 he must pay the marshal's and clerk's and attorney's fees of the defendant. It is significant that having provided by two sections for the payment in the case of informers no provision was made when the United States unsuccessfully prosecuted a defendant. I think that it is apparent that when the defendant is successful against the United States no costs or fees were intended to be enforced against it. This is especially true in view of the closing words of section 976, which provide for a case where the United States should pay the fees itself. There can be no doubt that the United States is not liable in any event.

On the other hand, it is equally clear that some one must pay the clerk for services precisely similar to those in a civil case. Section 976 provides for the payment of clerk's fees in actions *qui tam*, and there is no ground for distinction between such and strictly criminal prosecutions. Section 828, Revised Statutes, applies to criminal cases as well as section 824, *U. W. v. Kurtz*, 164 U. S. 49, and the clerk is as much entitled to withhold his fees as though he retained all his receipts instead of accounting for them and paying over all the surplus above his allowances. The theory of all fee offices is that the service earns the fee, nor is it an answer as to the clerk that the defendant in case of defeat has no recourse over. Obviously, such would be no answer if the opposite party in a civil action were insolvent, a somewhat analogous case. The clerk is therefore entitled to the fee.

The result is that the motion must be denied. This unfortunate consequence follows from the fact of the immunity of the United States, like all other sovereigns, from any of the risks of litigation. The

clerk, like the court, stands outside each and his rights, which are actual, should not be prejudiced because the result may be unjust between the parties. Whether the case may present an occasion for relief by application to the proper public authority is of course another matter, but it is outside the range of judicial inquiry.

July 19, 1918.

D. J.

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